

B. J. Heating & Air Conditioning, Inc. and Sheet Metal Workers' Union, Local No. 162, Sheet Metal Workers' International Association, AFL-CIO. Case 20-CA-16621(E)

26 January 1984

**SUPPLEMENTAL DECISION AND
ORDER REMANDING PROCEEDING TO
ADMINISTRATIVE LAW JUDGE**

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 11 January 1983 Administrative Law Judge Russell L. Stevens issued the attached supplemental decision. The Applicant filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent herewith.

B. J. Heating & Air Conditioning filed an application for an award of attorneys' fees and expenses under 5 U.S.C. § 504 of the Equal Access of Justice Act (EAJA), 94 Stat. 2325 (1980). The judge dismissed B. J. Heating's application as untimely because it was allegedly not filed with the Board within the jurisdictionally prescribed 30-day time period under 5 U.S.C. § 504(a)(2) of the EAJA. The Applicant observes that the 30th day fell on Sunday, 10 October 1982. The following Monday was a legal holiday, and the application was filed on 12 October, the first business day following expiration of the 30-day filing period. The Applicant argues that under these circumstances the application was timely filed. We find merit in the Applicant's position.

We reiterate our earlier holding that, because the EAJA is a waiver of sovereign immunity, the 30-day filing period is a jurisdictional prerequisite that the Board cannot legally extend.² The issue, however, is whether the 30-day period included Tuesday, 12 October, or ended for all practical purposes on Friday, 8 October, 28 days after the entry of the Board's final order. Considerations of fairness, well-settled rules of statutory construction, and long-honored time computation rules combine to

dictate exclusion of the final Saturday, Sunday, or holiday when calculating the 30-day period. That the final day fell on Sunday and the following Monday was a Federal holiday was merely a matter of accident—surely not a sufficient basis to deprive the Applicant of its right to apply for reimbursement of attorney's fees.

Furthermore, Rule 6(e) of the Federal Rules and Civil Procedure, provides in relevant part that:

[I]n computing any period of time prescribed or allowed by these rules . . . or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

Since this rule had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this application, we think that it is reasonable to assume that Congress had these time computation principles in mind when it legislated and we construe the statute accordingly. Indeed, the Board's own Rules and Regulations provided for time computation in a manner similar to that set forth in Rule 6(a).³ It is important to bear in mind that these rules relate to matters of procedure only and do not diminish, modify, or enlarge the substantive rights of Applicant. Application of the Board's rules, therefore, does not extend the time within which an application must be filed. We are merely defining what happens when the 30th day falls on a Saturday, Sunday, or legal holiday. As the instant application was filed on the first business day following the Sunday expiration date, the filing was timely.

ORDER

The National Labor Relations Board orders that this proceeding be remanded to Administrative Law Judge Russell L. Stevens for such further action as is required in light of our decision to accept as timely filed the application of B. J. Heating & Air Conditioning, Inc. for attorney's fees and expenses, including the issuance of a decision on the merits of the application.

¹ The Applicant has excepted to the judge's finding regarding the date on which the regional director withdrew the complaint. Though the regional director inadvertently failed to date the letter he issued withdrawing the complaint, we are satisfied, for reasons set forth by the judge, that the entry date was 10 September 1982.

² *Monark Boat Co.*, 262 NLRB 994 (1982), *aff'd*, 708 F.2d 1322 (8th Cir. 1983).

³ See Board's Rules and Regulations, Sec. 102.114.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative law Judge: The complaint in Case 20-CA-16621, which issued on January 29, 1982,¹ alleged that B. J. Heating & Air Conditioning, Inc. (B.J.) had violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act). The hearing in Case 20-CA-16621 was opened on August 31, 1982, in consolidation with two other cases, 20-CA-16449 and 20-CA-16451. At the hearing, after preliminary matters were attended to but prior to the taking of any testimony, counsel for the General Counsel moved to sever Case 20-CA-16621 from the other two cases. The General Counsel's motion was granted by the Administrative Law Judge over objection of B.J.'s counsel. On September 1, B.J.'s counsel requested from the National Labor Relations Board (NLRB or Board) permission to appeal the judge's order granting the General Counsel's motion to sever Case 20-CA-16621. On a date that is in dispute (discussed infra), the Regional Director for Region 20 of the National Labor Relations Board notified B.J.'s counsel of his decision to withdraw the complaint in Case 20-CA-16621. On September 17 the Board denied the request of B.J.'s counsel for permission to appeal the judge's order of severance given on August 31. By document dated October 7, received by the Board October 12,² B.J.'s counsel applied for an award of fees and expenses under the Equal Access to Justice Act (EAJA). By order dated October 18, NLRB referred the application of B.J.'s counsel to me for appropriate action. On November 10, counsel for the General Counsel issued and filed a motion to dismiss the application of B.J.'s counsel, together with a supporting memorandum. On November 29 B.J.'s counsel issued and filed the applicant's response to the General Counsel's motion to dismiss. By letter dated November 24, filed November 26, counsel for the General Counsel advised me, with copies of B.J.'s counsel and other addressees, of a recent case deemed applicable to these proceedings.

Issues

The General Counsel's motion to dismiss sets forth nine issues, all but one of which refer to procedural allegations of the application which the General Counsel contends are deficient or cover nonallowable fees and expenses. Substantially, the General Counsel contends that the application was not timely filed.

B.J.'s response contends that the application was timely filed and is adequate basis for an award.

1. Timeliness of filing

This issue results from the fact that the application was filed on Tuesday, October 12, following Saturday and Sunday, October 9 and 10, and the Monday holiday of October 11.

¹ All dates hereinafter are within 1982, unless otherwise stated.

² This date of filing, October 12, is acknowledged by B.J.'s counsel.

The initial problem is the fact that the Regional Director's notification of withdrawal of the complaint³ does not carry a typed date. Counsel for the General Counsel's memorandum in support of the motion to dismiss has appended to it as Exhibit 1, a copy of the Regional Director's letter of withdrawal. That letter shows a date stamp of "Sep. 10 1982." B.J.'s response to the General Counsel's motion memorandum has an Exhibit A, which also is a copy of the Regional Director's withdrawal letter. Exhibit A has a date stamp also, but it reads "Received Sep 13 1982." In his affidavit supporting Exhibit A, Ronald Brown, a law clerk in the office of B.J.'s counsel, stated, *inter alia*, that he received the letter on or about September 15. Brown does not state from whom he received the letter, but he states that on or about September 15 he was advised by Robert Johnson, president of B.J., and Leana Keeling, bookkeeper and an owner of River City Mechanical,⁴ that the two of them had received undated copies of the letter.

The record is skimpy on this point, but the inference is strong, and it is found, that the Regional Director withdrew the complaint on September 10. It is the withdrawal date that controls the issue; the date B.J. received the notice of withdrawal is not controlling.⁵ September 10 was on a Friday; September 13 was on a Monday. Brown's affidavit leaves unanswered the question of from whom the withdrawal notice was received, but it is apparent that the date of September 13 was the date the notice was marked received, and not the date of the letter itself. B.J.'s counsel argues that the date of September 10 could have been placed on the General Counsel's exhibit in a manner that, inadvertently or intentionally, resulted in a self-serving document, but that argument applies equally well to the letter stamped as received September 13. In view of the facts that September 10 was on a Friday, and that the letter of withdrawal was in B.J.'s hands the following Monday, the conclusion is logical that the letter of withdrawal was written and mailed on Friday, as contended by counsel for the General Counsel. It is most unlikely that the Regional Director could have written a letter and had it delivered by mail on the same day to addresses in at least two, and possibly three, separate places.

The second question on this issue is whether or not the 30-day provision of the Board's rule, Section 102.148(a) was complied with. That section provides, *inter alia*, that applications under EAJA may be filed⁶ ". . . in no case

³ The fact that withdrawal of the complaint is a "final order" within the meaning of Sec. 102.48 of the Board's Rules and Regulations is not in dispute.

⁴ River City Mechanical is a respondent in the aforesaid Cases 20-CA-16449 and 20-CA-16451.

⁵ See *Monark Boat Co.*, 262 NLRB 994, 995 (1982), wherein the Board stated, *inter alia*, "Thus, here, since it is the entry of the Board's final order that marks the beginning of the filing period, rather than service of notice of final judgment, Section 102.114(a) [note: of the Board's rules, relating to time periods 'after service'] is immaterial."

⁶ The date of the application and the date of mailing are irrelevant, so far as filing is concerned. The relevant date is the one on which the application physically is received by the Board. The Board's Rules, Sec. 102.148(1). See *Monark Boat Co.*, *supra*.

later than 30 days after the entry of the Board order" In this case, the application was filed with the Board on October 12, which is the 32nd calendar day after September 10. There is no case precedent exactly on point, but there is considerable guidance in Board decisions. In *Monark Boat Co.*, supra, the application had been filed on the 31st day after the entry of the Board's final order. The Board briefly reviewed the legislative history of EAJA, inter alia, and concluded "the above compels us to conclude that the 30-day period is a jurisdictional prerequisite which we cannot legally extend." The Board also stated "As Congress by this statute relinquished the Government's immunity from suit, we must construe it strictly," citing *U.S. v. Sherwood*, 312 U.S. 584, 586, 590-591 (1941). In its footnote 5 in the *Monark* decision, the Board stated:

Respondent cites several cases which stand for the proposition that, when a filing period expires on Sunday, filing on the following Monday is timely. We are unprepared to analogize those cases to the instant situation, where the Respondent failed to file its application by a Tuesday. Reliance on *Zipes v. Trans World Airlines*, 50 LW 4238 (U.S. 1982), is also misplaced. *Zipes* did not involve statutes waiving sovereign [immunity].

After deciding *Monark*, the Board was presented with *Lord Jim's*,⁷ wherein the application under EAJA was mailed 3 days before the due date, and was untimely filed because of postal delays. The Board affirmed the decision of Administrative Law Judge Pollack, who stated, inter alia, "under the *Monark Boat Company* rationale the Board and its administrative law judge are without jurisdiction to consider an application which is not filed within the specified statutory jurisdictional time period." In affirming Administrative Law Judge Pollack, the Board, 264 NLRB 1098 fn. 1, stated, inter alia:

. . . our calculations show that the 30th day after entry of the Board's decision was on Sunday, February 21. Since Respondent did not file its application with the Board in Washington until February 24, we need not decide whether, because the 30th day fell on a Sunday, a filing on the following Monday would have been timely, even had it been properly made in Washington. See *Monark Boat*, supra, fn. 5.

Since the statute limits timely filing to 30 days, and since the Board has determined that the 30-day provision must be strictly construed, and applies even though the filing is on the 31st day (*Monark*), or is delayed by mail delivery (*Lord Jim's*), the only question is whether or not the Board may extend a 30-day period falling on a Sunday. If there is such authority for the Board to extend the period, it must be implied, for it is not expressed in the EAJA statute, or rules relating thereto.

⁷ 264 NLRB 1098 (1982).

The Board has stated that it cannot extend the jurisdictional prerequisite of a 30-day filing,⁸ and that view is in accordance with the view of the U.S. Supreme Court, which stated, inter alia, in *Soriano v. U.S.*, 352 U.S. 270 (1975), "And this Court has long decided that limitations and conditions upon which the Government consents to be sued be strictly observed and exceptions thereto are not to be implied" Had Congress meant to extend the 30-day period if it fell on a Sunday, it must be presumed that it would have said so. Such expressions are not unusual or impractical. B.J.'s counsel relies on Rule 6(a) of the Federal Rules of Civil Procedure and Section 102.114 of the Board's rules, and cites several cases decided under those rules, wherein filing dates falling on Sunday were extended. However, the situation relative to those rules is quite different from that involved herein. Rule 6(a) specifically excludes from time computations days expiring¹⁰ on a Sunday or a holiday, and further, that rule gives courts broad authority to extend times otherwise specifically limited. Still further, Rule 6(a) has the express concurrence of Congress. In similar manner, the Board's rule, Section 102.114, expressly provides for a 1-day extension of time if the last day of a period falls on a Sunday or a holiday. There is no statute or rule involved in this case which: (a) gives the Board authority to extend the 30-day filing period, or (b) expressly provides that the 30-day period may be extended under certain circumstances.

As pointed out by counsel for the General Counsel, the choice of words used in Section 504(a)(2) of the EAJA (filing of an application must be "within thirty days" of entry of the Board's final order) and in Section 102.148(a) of the Board's rules (filing must be "in no case later than" 30 days after entry of order) make it clear that the 30-day provision sets the outside limit for filing. There is no basis for implying that Congress intended to provide possible relief when the filing date was cut so close that it was missed only because Sunday or a holiday was the 30th day.

It is found that the filing of the FAJA application involved herein was not timely, and is subject to dismissal for that reason.

2. Objections to the application

The General Counsel raised issues relating to the Applicant's net worth statement; claim for allegedly nonrelated work; allegedly excessive hourly work rate; work allegedly performed prior to the effective date of EAJA; allegedly improper claim for fees and expenses predating issuance of the complaint and for preparation of the EAJA application; alleged failure to state particulars relating to the claim; and the General Counsel's justification in issuing the complaint.

⁸ *Haynes-Trane Service Agency*, 265 NLRB 958 (1982); *Columbia Mfg. Corp.*, 265 NLRB 109 (1982).

⁹ See also *Wallis v. U.S.*, Ct. Cl. No. 453-79C.

¹⁰ With some exceptions described in the rule.

In view of the findings and conclusions discussed above and the Board's position that it has no jurisdiction over an application not timely filed, no findings or con-

clusions are made relative to the various procedural defects alleged by the General Counsel.¹¹

[Recommended Order for dismissal omitted from publication.]

¹¹ *Haynes-Trane Service Agency*, supra; *Columbia Mfg. Corp.*, supra.